

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TYRONE HENRY,

Plaintiff,

v.

PORTLAND DEVELOPMENT  
COMMISSION, LORI SUNDSTROM,  
and BRUCE WARNER,

Defendants.

No. CV-06-712-HU

FINDINGS & RECOMMENDATION

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HUBEL, Magistrate Judge:

Plaintiff Tyrone Henry brings this employment and civil rights  
action against his former employer, the Portland Development

1 - FINDINGS & RECOMMENDATION

1 Commission (PDC), and two of its executives, Lori Sundstrom and  
2 Bruce Warner. Defendants move for summary judgment. I recommend  
3 that the motion be granted as to some of the punitive damages  
4 claims, and otherwise denied. Plaintiff moves to strike certain  
5 evidence and argument by defendant. I deny that motion.

#### 6 BACKGROUND

7 The PDC is the urban renewal agency of the City of Portland.  
8 The agency is governed by a five-member board of commissioners who  
9 are appointed by the Mayor and approved by the City Council. The  
10 Commission's day-to-day functions are carried out through its  
11 Executive Director, who oversees approximately 180 employees.

12 Plaintiff, who is African-American, was hired by the PDC in  
13 1998. The record is a bit unclear regarding his initial position,  
14 but it appears that after about one year, he took on responsibility  
15 for the PDC's Minority, Women, and Emerging Small Business Program  
16 (MWESB). After a brief period, Linda Andrews became his immediate  
17 supervisor.

18 According to plaintiff, he spearheaded efforts to increase the  
19 number of minority contractors, union and non-union trade  
20 organizations, developers, workers, and community-based  
21 organizations, involved in carrying out the PDC's mission by  
22 encouraging the PDC to adopt a more formalized set of programs  
23 targeting not just emerging small businesses, but minority and  
24 women-owned businesses as well. Pltf's Declr. at ¶ 3 (Pltf's Exh.  
25 1). He states that he increased the MWESB "utilization goal" from  
26 10% to 20%. Id. He states that because of his expertise, he was  
27 appointed as chair for PDC's Contracting Advisory Committee to  
28 assess how best to broaden subcontracting opportunities. Id.

2 - FINDINGS & RECOMMENDATION

1 Andrews joined the PDC in 1999 as the Professional Services  
2 Manager and has held that position throughout her employment with  
3 the PDC. According to Andrews, while she generally had a positive  
4 working relationship with plaintiff, she felt that he did not take  
5 direction well and resented anyone supervising him. Andrews Declr.  
6 at ¶ 4. She states that plaintiff's job was relatively new to the  
7 PDC when he started, and she initially gave him a lot of latitude  
8 in carrying out his job responsibilities. Id. at ¶ 5. Over time,  
9 she felt that both she and plaintiff had a better sense of what was  
10 required in overseeing the MWESB program. Id. Nonetheless, she  
11 was concerned that the success being reported in the MWESB may not  
12 directly relate to plaintiff's efforts. Id. She felt plaintiff  
13 was delinquent in generating required reports and was generally  
14 hostile toward anyone he perceived as being critical of him. Id.  
15 at ¶ 8.

16 Plaintiff's evidence includes the following performance  
17 evaluations: (1) an annual evaluation dated October 31, 2001; (2)  
18 an evaluation ending June 30, 2003; (3) an evaluation dated July  
19 15, 2004; and (4) an annual evaluation for the period ending July  
20 1, 2005. Pltf's Exhs. 4a-4d. Overall, they are positive, and  
21 sometimes quite positive. The October 31, 2001 evaluation contains  
22 ratings in sixteen categories and plaintiff was marked as above  
23 average or exemplary in all of them. Pltf's Exh. 4a. Overall, he  
24 was rated as having an exceptional performance for that period.  
25 Id.

26 The "Overall Performance Rating" for the evaluation dated June  
27 30, 2003, was "exceeds expectations" and plaintiff received a  
28 raise. Pltf's Exh. 4b. However, the "Overall Performance Rating"

1 for the evaluation dated July 15, 2004, slipped to "fully  
2 successful." Pltf's Exh. 4c. On that evaluation, plaintiff was  
3 marked between "rarely" and "often" for displaying certain  
4 dependability and communication traits defined by the PDC as  
5 indicative of the employee's competence. Id. Finally, on the July  
6 1, 2005 evaluation, plaintiff received a "partially meets" overall  
7 ranking for various "results" categories, and a "fully successful"  
8 overall ranking for various "competency" categories. Pltf's Exh.  
9 4d. Some individual marks were higher or lower. Id. His overall  
10 rating for all categories was "fully successful." Id.

11 Plaintiff also received a variety of letters of positive  
12 recognition while employed by the PDC, as well as several salary  
13 raises. Pltf's Exhs. 5, 6.

14 The July 1, 2005 performance evaluation gives some indication  
15 that the period under review, July 1, 2004 to June 30, 2005, was  
16 not an easy one. Pltf's Exh. 4d at p. 4. Plaintiff stated that it  
17 had been his most challenging year. Id. He made negative comments  
18 about how the MWESB annual report was handled and noted poor  
19 handling by upper management of "impropriety accusations." Id.

20 In his declaration, plaintiff states that in late 2004 and  
21 early 2005, Andrews and Nancy McClain, the PDC's Chief Financial  
22 Officer and Andrews's boss, began treating him differently. Pltf's  
23 Declr. at ¶ 7. He makes the same complaint about his subordinates.  
24 Id.

25 He cites to an email he wrote to Andrews on January 25, 2005,  
26 in which he complained about how Andrews had approached him  
27 regarding a presentation to the PDC Commission. Pltf's Exh. 9.  
28 There, plaintiff complained to Andrews that while he did not have

1 a problem giving Andrews and "Nancy" (presumably McClain), an  
2 outline of his presentation, he thought her "way of handling" the  
3 request (presumably requiring him to give her the presentation),  
4 was inappropriate. Id. He accused Andrews of causing him undue  
5 stress, mental anguish, and borderline harassment. Id. Plaintiff  
6 copied the email to Mary Manning, the PDC's Human Resources  
7 Manager.

8 Next, plaintiff cites to a memorandum dated February 22, 2005,  
9 in which he notes an alleged plot by McClain and Andrews to  
10 secretly meet with his support staff. Pltf's Exh. 10 ("I have long  
11 suspected that Nancy McClain and Linda Andrews have been secretly  
12 meeting with my support staff (John Classen & Toni Severe-Marcelin)  
13 without any notification or explanation forwarded to me, their  
14 Manager."). There is no indication that this memorandum was sent  
15 to anyone, but plaintiff states in his declaration that he  
16 discussed these concerns with Manning. Pltf's Declr. at ¶ 8.

17 On March 4, 2005, plaintiff was placed on administrative leave  
18 pending an investigation into an allegation that he failed to  
19 account for funds contributed to the PDC by Williams & Dame, the  
20 developer of the South Waterfront Project. See Pltf's Exh. 14;  
21 Pltf's Declr. at ¶ 9.

22 On March 10, 2005, plaintiff's then-attorney Nicholas Fish  
23 wrote to Chip Lazenby, who was general counsel for the PDC at that  
24 time, to state that Fish had been "retained to pursue a formal  
25 grievance on behalf of Mr. Henry concerning a pattern of workplace  
26 harassment and discrimination at the [PDC]." Pltf's Exh. 11. The  
27 letter contained a background section which included this  
28 paragraph:

5 - FINDINGS & RECOMMENDATION

1 Over the past several months, Mr. Henry has been  
2 unfairly targeted by Linda Andrews, his immediate  
3 supervisor, and Nancy McClain, PDC's Chief Financial  
4 Officer. Their interaction with him has become  
5 increasingly abrupt and disrespectful, while his work has  
6 been the subject of unwarranted criticism. He has been  
7 criticized, among other things, for his writing skills,  
his decision to seek input of South Waterfront  
Development Agreement team members in the preparation of  
his most recent annual report, and his leadership style.  
When Mr. Henry sought to schedule a meeting with Mary  
Manning, Human Resources Manager, to address these issues  
she repeatedly put him off.

8 Pltf's Exh. 11 at p. 2.

9 Plaintiff believes the allegation against him concerning the  
10 funds was made by his assistant Toni Severe-Marcelin, possibly with  
11 McClain's help. Id. at pp. 2-3. An investigation found the  
12 allegation to be unsubstantiated. Id. at pp. 2-3.

13 In his March 10, 2005 letter, Fish articulated a grievance on  
14 plaintiff's behalf, alleging violations of several sections of the  
15 PDC's written personnel policies. He demanded, at a minimum: (1)  
16 a formal written apology from McClain, the then-Executive Director  
17 of the PDC Don Mazziotti, and Lazenby, to be placed in plaintiff's  
18 personnel file with copies to Dike Dame and someone with the  
19 carpenter's union; (2) a formal investigation into the PDC's  
20 handling of the matter to be conducted by a mutually agreed-upon  
21 outside independent investigator; and (3) an appointment of a new  
22 staff assistant given the "role played" by Severe-Marcelin. Id. at  
23 p. 3.

24 On May 10, 2005, Williams & Dame wrote a letter to Mazziotti,  
25 strongly urging the PDC to keep plaintiff involved in the work  
26 force diversity issues at South Waterfront. Pltf's Exh. 15.  
27 Plaintiff states that before his "4/05 racial  
28

1 harassment/discrimination complaint"<sup>1</sup>, he was given copies of such  
2 positive recognition, but this letter from Williams & Dame was kept  
3 from him. Pltf's Declr. at ¶ 10.

4 In late July 2005, Manning met with plaintiff and Andrews to  
5 go over a "Communication Agreement" in hopes of improving the  
6 working relationships between plaintiff and Andrews and plaintiff's  
7 peers. Exh. 1 to Belnavis May 18, 2007 Declr. at p. 81. The  
8 agreement listed nine separate items that plaintiff and Andrews  
9 should agree to, including promises not to raise voices, not to  
10 walk out of meetings, to listen to the opinions of others, and to  
11 acknowledge that the supervisor/manager gets to make the final  
12 decision on work-related issues. Id.

13 The next day, Andrews, Manning, and Director of Finance Mark  
14 Murray, met with plaintiff to go over a performance improvement  
15 plan (PIP). Id. at p. 89. The PIP indicates that it was a follow-  
16 up to a discussion regarding plaintiff's 2004-2005 year-end  
17 evaluation, and as apparently discussed, the need for plaintiff to  
18 attend to several areas of concern so that his Fiscal Year (FY)  
19 2005-2006 mid-year evaluation would improve and he could achieve a  
20 "Fully Successful" rating. Id. Three areas of concern were  
21 specifically addressed: teamwork/partnering, dependability, and  
22 managing others. Id. at pp. 89-90. Each area had comments in  
23 three sections: expected behavior, examples of plaintiff's  
24 observed behavior, and an action plan. Id.

25 Some of the examples of observed behavior were: (1)  
26

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27 <sup>1</sup> The reference to a "4/05 racial harassment discrimination  
28 complaint" is unclear.

1 disrespectful treatment of other employees as reported by members  
2 of the contracts compliance section; (2) a lack of "partnership"  
3 with Andrews as exemplified by plaintiff's failure to follow-up on  
4 tasks and making personal, unprofessional remarks in meetings; (3)  
5 Andrews's belief that plaintiff failed to update her on key  
6 events/tasks; and (4) failure of the contracts compliance section  
7 to work as a team and present consistent information. Id.

8 Andrews went through each of the specific points. Plaintiff  
9 disagreed with the PIP. Pltf's Depo. at p. 150 (Exh. 1 to Belnavis  
10 May 18, 2007 Declr.). In his deposition, plaintiff stated that he  
11 disagreed with it because "it depicted me as not doing certain  
12 things within the agency." Id. In his declaration, he states that  
13 he told Andrews and Manning that the allegations about his  
14 relationships and communications with his staff were not true.  
15 Pltf's Declr. at ¶ 18. Plaintiff refused to sign the PIP and  
16 Andrews indicated it would still go in plaintiff's file and that  
17 plaintiff would be expected to adhere to her improvement plans.  
18 Pltf's Depo. at p. 152.

19 Plaintiff contends that on August 8, 2005, Fish wrote another  
20 letter on plaintiff's behalf, to Matt Baines, who had apparently  
21 replaced Lazenby as the PDC's general counsel. Pltf's Exh. 23. In  
22 contrast to Fish's March 10, 2005 letter, the August 8, 2005 letter  
23 is not on Fish's office letterhead. Id. Assuming nonetheless that  
24 Fish wrote the letter, Fish complained on plaintiff's behalf that  
25 the workplace harassment and discrimination had not been resolved.  
26 Id. Specifically, the letter refers to the PIP and cites  
27 plaintiff's disagreement with several parts of it. Id. The letter  
28 also mentions a possible transfer to a different department within



1 the PDC which would have been acceptable to plaintiff. Id. He  
2 further states that although he thought plaintiff's March 2005  
3 grievance had been resolved by settlement, the PIP and a recent  
4 evaluation raised concern that the PDC continued to treat plaintiff  
5 in an unfair and discriminatory manner. Id.

6 Warner became the PDC's new executive director on August 1,  
7 2005. Early on, he met with all of his "direct reports" to  
8 understand their roles and responsibilities and to determine what  
9 "hot" issues needed to be addressed. Warner Depo. at p. 21 (Exh.  
10 2 to Belnavis May 18, 2007 Declr.). Even though he did not  
11 directly supervise plaintiff, Warner met with plaintiff in  
12 September 2005, at plaintiff's request. Plaintiff indicated he  
13 wanted someone other than Andrews to supervise him and he gave his  
14 ideas for "growing this MWESB program." Pltf's Depo. at pp. 141-  
15 43. According to plaintiff, Warner indicated that changing  
16 supervisors was a possibility because he was going to be changing  
17 things around. Id. at p. 143.

18 In his declaration, plaintiff states that during this  
19 September 2005 meeting with Warner, he complained about the lack of  
20 respect and support he received from Andrews and others for the  
21 work he was trying to do to grow the MWESB Program. Pltf's Declr.  
22 at ¶ 22. He alleges that Warner did not seem interested, did not  
23 look him "eye to eye," and looked at his watch instead. Id. He  
24 states that he tried on other occasions to meet with Warner to  
25 discuss his concerns about the lack of support he was receiving and  
26 his attempts to increase the number of minority contractors  
27 involved with the PDC's projects, and some of the specific  
28 challenges in getting minority contractors involved with South

1 Waterfront, but that Warner never seemed interested. Id.

2 Warner testified that he intended to reorganize management so  
3 that the MWESB program would be elevated to the executive office,  
4 and the manager overseeing plaintiff would be part of the executive  
5 team, which Andrews was not. Warner Depo. at p. 85. After that  
6 change, Warner would then determine what was needed such as  
7 resources and staffing. Id.

8 Andrews contends that on or about September 22, 2005, she met  
9 with plaintiff to go over several emails that other PDC employees  
10 had sent complaining about plaintiff, as well as some other issues.  
11 Exh. 1 to Belnavis May 18, 2005 Declr. at p. 74 (October 2, 2005  
12 Last Chance Agreement Memorandum noting discussion of September 22,  
13 2005); Pltf's Depo. at pp. 130-31 (stating he saw some emails but  
14 not indicating date). In his deposition, plaintiff stated he did  
15 not recall the September 22, 2005 meeting that Andrews referred to  
16 in the October 2, 2005 Last Chance Agreement memorandum. Pltf's  
17 Depo. at p. 153. In his declaration, he states that his calendar  
18 bears no reference to any meeting with Andrews for the week of  
19 September 19, 2005. Pltf's Declr. at ¶ 23.

20 On October 3, 2005, Andrews met with plaintiff and Manning to  
21 provide plaintiff with a Last Chance Agreement. Plaintiff believes  
22 that Baines may have also been present. The agreement outlined  
23 various issues that Andrews believed plaintiff was still struggling  
24 with such as working productively on teams, being dependable,  
25 following through on tasks, and appropriately managing others.  
26 Exh. 1 to Belnavis May 18, 2007 Declr. at pp. 74-77. The  
27 agreement, much like the PIP, included various action plans to  
28 correct the problems. Id.

1 During the meeting, plaintiff asked if he could take the  
2 document to his attorney to be reviewed. Pltf's Depo. at p. 125.  
3 Plaintiff states that his request was refused. Id. He complains  
4 that he was never given the opportunity to rebut the assertions in  
5 the Last Chance Agreement and never got to speak with Manning,  
6 Warner, or Murray about his concerns regarding Andrews. Id. He  
7 asserts that the agreement is false or misleading about his job  
8 performance. Pltf's Declr. at ¶ 24.

9 The concluding paragraph of the Last Chance Agreement states  
10 that failure to sign it or to make "observable improvements," among  
11 other things, will result in disciplinary action, up to and  
12 including termination. Exh. 1 to Belnavis May 18, 2007 Declr. at  
13 p. 77. Plaintiff signed the agreement, indicating that he had read  
14 and agreed to the above terms. Id.

15 On October 28, 2005, Warner announced a reorganization of  
16 management. Among other changes, he eliminated the deputy  
17 executive director position and created an executive officer  
18 position. Exh. 2 to Belnavis May 18, 2007 Declr. at p. 12. At the  
19 time, the deputy executive director was Wyman Winston, an African-  
20 American. Warner hired Sundstrom, a Caucasian, as the new  
21 executive officer. She started her position on November 7, 2005.

22 Not long after coming to the PDC, Warner formed a task force  
23 to address the business challenges faced by small businesses in  
24 general, as well as those covered by the MWESB program. The group  
25 consisted of several employees, including plaintiff and Jennifer  
26 Nolfi, Economic Development Manager for Small Businesses. The  
27 group met on November 8, 2005. Plaintiff contends that while he  
28 was making a point during that meeting, Nolfi raised a contrary

1 point, and "cut me off[.]" Pltf's Depo. at p. 84. The exchange,  
2 to plaintiff's recollection, was that he was talking about the  
3 MWESB and about how he and his team had "taken it from nothing to  
4 being one of the best in the state." Id. at p. 86. Nolfi  
5 apparently made reference to plaintiff as saying that plaintiff was  
6 not the only one involved in the program. Id.

7 Plaintiff states that when Nolfi cut him off, he asked if he  
8 could finish his point and he had to say that three times. Id. at  
9 p. 84. He denies raising his voice. Id. There is a dispute about  
10 whether he did so. Plaintiff believes that it was disrespectful of  
11 Nolfi to cut him off. Id. at p. 87. Sundstrom attended the  
12 November 8, 2005 meeting and observed that plaintiff "talked over  
13 people, wouldn't respond to the ... topics on the table, . . . and  
14 would not let others speak." Sundstrom Depo. at p. 128 (Exh. 1 to  
15 July 19, 2007 Barton Declr.).

16 Later that day, November 8, 2005, Andrews met with plaintiff  
17 after learning that plaintiff would be reporting directly to  
18 Sundstrom in the near future instead of to Andrews. Andrews met  
19 with plaintiff to see if he had any questions for her regarding the  
20 transition. Plaintiff states that Andrews asked him if there was  
21 anything that he needed to discuss regarding the South Waterfront  
22 project. Pltf's Depo. at p. 89. Andrews apparently stated that  
23 she would still be involved in the project. Id. at p. 90.  
24 Plaintiff states that in response, he said "well, depending -- if  
25 you want to still be involved, I don't know, again, I don't know if  
26 you're going to be involved or not." Id.

27 Plaintiff contends that at this point, Andrews began to raise  
28 her voice and plaintiff responded by saying that he was not going

1 to "sit here and allow you to berate me or belittle me." Id. He  
2 said "this is simply not right, not professional. And until you  
3 calm down, I refuse to meet with you." Id. He also said "until  
4 you calm down, I don't think that I should have to sit here and  
5 listen to you raise your voice at me. I said, I understand you  
6 might be a little upset because I'm no longer under your  
7 supervision, but I believe that you have received word that I am  
8 going to be moving." Id. at pp. 90-91. He then left the room.

9 Andrews states that it was plaintiff who raised his voice in  
10 an aggressive and abusive manner. Andrews Declr. at ¶ 9.  
11 Plaintiff states he does not recall if Andrews perceived his  
12 speaking to her during this meeting or his body language during  
13 this meeting, as being aggressive or insubordinate. Pltf's Depo.  
14 at p. 112.

15 The record is unclear as to how Baines and Manning learned of  
16 these two events involving plaintiff on November 8, 2005. But,  
17 they did, and they then drafted a memorandum for Warner's  
18 signature, dated November 9, 2005, notifying plaintiff that his  
19 conduct was considered to be a continued failure to interact  
20 positively with his peers.

21 The memorandum specifically noted that plaintiff was subject  
22 to the Last Chance Agreement and its requirement that he adhere to  
23 established communications rules during meetings. Id. at p. 78.  
24 The memorandum also specifically noted that plaintiff failed to  
25 adhere to three particular provisions of the communications rules:  
26 (1) agreeing not to raise voices no matter how upset people get;  
27 (2) agreeing not to walk out of a meeting unless someone  
28 specifically requests a "break," and then the break is no longer

1 than five minutes with all parties agreeing to return; and (3) the  
2 manager may make a final decision that all parties do not  
3 necessarily agree with and the disagreeing party has the option to  
4 tell the manager that although they understand it, is the manager's  
5 decision and they will adhere to it, even though they do not agree  
6 with it. Id.

7 Warner informed plaintiff that it had been explained to Warner  
8 that during the November 8, 2005 meeting with Andrews, plaintiff  
9 had raised his voice at Andrews in an aggressive and threatening  
10 manner, had argued with her about who the decision-maker was on an  
11 issue where she and plaintiff had a disagreement, and walked out of  
12 the meeting before its completion. Id.

13 Warner also referenced the meeting in which plaintiff and  
14 Nolfi clashed and noted that plaintiff appeared to fail to "treat  
15 others with utmost dignity" because he responded to a statement  
16 made by another meeting participant in an aggressive and rude  
17 manner during the meeting. Id. at p. 79. Warner stated that the  
18 outburst was perceived as not only unprofessional, but  
19 inappropriate. Id.

20 Warner decided not to discharge plaintiff at the time because  
21 he wanted to give plaintiff another chance to succeed. Plaintiff  
22 received a two-day suspension. Id.

23 Plaintiff recites that for several months before November 8,  
24 2005, he tried to meet with human resources staff to stop Andrews's  
25 "mistreatment" of him, when Andrews would allegedly raise her voice  
26 and berate and belittle plaintiff. Pltf's Declr. at ¶ 28.  
27 Plaintiff alleges that Manning repeatedly cancelled the meetings  
28 and was never of any assistance to plaintiff and thus, Andrews

1 continued to be an abusive supervisor. Id.

2 On or about November 16, 2005, plaintiff and six other  
3 minority employees again met with Warner and presented him with a  
4 memorandum outlining several points related to diversity at the  
5 PDC. Exh. 2 to Belnavis May 18, 2007 Declr. at pp. 21-28. The  
6 memorandum noted the value that the PDC's policies placed on  
7 diversity and Warner's "sentiment . . . that all employees 'will  
8 support diversity goals and work toward a diverse workplace.'" Id.  
9 at p. 21. The memorandum also included ideas as to how the PDC  
10 could do a better job of hiring, retaining, and utilizing diverse  
11 individuals, expressed the opinion that the PDC should increase the  
12 number of diverse contractors and other entities with which it  
13 works, suggested steps that the PDC could take to implement the  
14 goal of increasing diversity, and included an article and a related  
15 outline on workplace diversity. Id. at pp. 21-28.

16 The memorandum lacked any specific criticism of Warner or  
17 other members of management. Rather, it spoke more generally to  
18 steps to be taken to increase diversity. Id. However, during the  
19 meeting, the employees raised a number of specific examples of what  
20 they perceived as discrimination at the PDC. Pltf's Exh. 50 (Cain  
21 Declr.) at ¶ 11.

22 According to plaintiff, Warner noted that "he was there to  
23 listen, and he would take everything back to his management staff  
24 and discuss it." Pltf's Depo. at pp. 48-49. Plaintiff does not  
25 recall anything inappropriate said or done by Warner at that  
26 meeting. Id. at p. 49.

27 In mid-November 2005, Sundstrom officially began supervising  
28 plaintiff and took over management responsibility for the MWESB

1 program. Sundstrom met with plaintiff and Andrews together to go  
2 over plaintiff's personnel record and "his issues." Sundstrom  
3 Depo. at p. 122 (Exh. 3 to Belnavis May 18, 2007 Declr.). During  
4 this meeting, Sundstrom, Andrews, and plaintiff reviewed the  
5 Communication Agreement, the Last Chance Agreement, and Warner's  
6 November 8, 2005 Memorandum. All three documents preceded  
7 Sundstrom's supervising plaintiff.

8 During this time, Sundstrom met with other employees who  
9 reported to her, to introduce herself and get to know them. One of  
10 them was John Classen, Project/Program Specialist. Plaintiff was  
11 Classen's direct supervisor.

12 During the meeting Sundstrom had with Classen, Classen raised  
13 several concerns about plaintiff. He indicated that he wanted to  
14 be reassigned to another job or department because he did not like  
15 working for plaintiff. Id. at p. 90. Classen had previously  
16 complained in July 2005 to Manning about verbal and email  
17 harassment by plaintiff, as well as threatening conduct by  
18 plaintiff. Exh. 1 to Belnavis May 18, 2007 Declr. at pp. 82-85.  
19 Classen even called in sick one day because of stress he attributed  
20 to plaintiff. Id. Sundstrom listened to Classen's concerns and  
21 let Classen decide if he wanted her to take action. Sundstrom  
22 Depo. at p. 94. He was applying for other positions and indicated  
23 that he was fine with continuing his work until he found something  
24 else. Id.

25 While he had worked for Andrews, plaintiff and Andrews had  
26 several conversations about staffing the MWESB program. In  
27 February 2005, plaintiff's assistant Toni Severe-Marcelin, was  
28 reassigned to assist with another department. Andrews Declr. at ¶



1 6. Andrews asserts that plaintiff asked for additional resources  
2 in early 2005, and Andrews took that request to her manager,  
3 McClain. Id. They decided to ask plaintiff to prepare a report  
4 outlining why he needed extra staff. Id.

5 Andrews states that months went by and she inquired repeatedly  
6 as to the status of the report. Id. at ¶ 7. Andrews contends that  
7 plaintiff stated he no longer needed the help. Id. Nonetheless,  
8 he submitted the report on or about July 27, 2005. Id. The  
9 October 2, 2005 Last Chance Agreement notes that recruitment for an  
10 additional staffperson was authorized and paperwork submitted to  
11 Human Resources on August 30, 2005. Exh. 1 to Belnavis May 18,  
12 2007 Declr. at p. 76. In that Agreement, Andrews notes that she  
13 was open to discussing placing a temporary employee in the Contract  
14 Compliance Section during the recruitment. Id.

15 When Sundstrom took over the supervision of plaintiff and the  
16 MWESB Program in mid-November 2005, she met with plaintiff about  
17 his request for more staffing. She indicated that she needed time  
18 to assess what plaintiff was doing in order to determine if more  
19 staff was needed. Sundstrom Declr. at ¶ 3. Sundstrom spoke to  
20 Warner about trying to secure additional resources from the City of  
21 Portland and others to help manage and monitor the program. Warner  
22 Depo. at p. 85.

23 In his declaration, plaintiff states that starting in mid-  
24 2005, he repeatedly complained to no avail about the lack of  
25 staffing for the MWESB Program. Pltf's Declr. at ¶ 20. As  
26 evidence, he first points to the July 27, 2005 memorandum regarding  
27 staffing. This is the memorandum that Andrews states plaintiff  
28 finally produced after Andrews requested it in February 2005.

1       Next, plaintiff points to an August 27, 2005 email he sent to  
2 Mark Murray, Cheryl Twete, Baines, and Warner, which complained  
3 about including Andrews on some of the issues involved in the South  
4 Waterfront Apprentice Agreement and that plaintiff should be given  
5 autonomy. However, he does not appear to complain of a lack of  
6 staff. Pltf's Exh. 24. The email mentions the hiring of a person  
7 named Anthony Lincoln and his subsequent departure, but does not  
8 ask for more staff. Id.

9       Next, plaintiff cites to a November 29, 2005 memorandum he  
10 wrote to Sundstrom in which he summarized the programs and  
11 resources offered currently or in the recent past by the PDC's  
12 MWESB Outreach Team. Pltf's Exh. 29. On page twelve, (marked Pltf  
13 00115), plaintiff asks for two full-time equivalent (FTE)  
14 positions. Id. On March 1, 2006, plaintiff wrote to Sundstrom  
15 and requested additional staff for the MWESB Section. Pltf's Exh.  
16 30. On March 3, 2006, he sent Sundstrom an email again complaining  
17 about losing an FTE the previous March and not having the person  
18 replaced. Pltf's Exh. 31.

19       Plaintiff states that Caucasian staff received additional  
20 staffing or a reduction in responsibilities when they requested it.  
21 Pltf's Declr. at ¶ 36. He cites to a particular example of Diane  
22 Lawrence who allegedly complained to Andrews about being overworked  
23 and Andrews arranging for the removal of some of Lawrence's  
24 responsibilities and shifting them to another employee. Id.

25       Sometime in January 2006, several of the employees who had  
26 previously spoken to Warner about diversity issues, met with  
27 Sundstrom regarding a few of the issues raised in the earlier  
28 November 2005 meeting with Warner. Pltf's Declr. at ¶ 38.

1 Plaintiff attended the meeting. Id. In his deposition, plaintiff  
2 does not recall what was specifically said at the meeting other  
3 than one comment purportedly made by Sundstrom that African-  
4 American employees were not the only employees of color at the PDC  
5 and "if there were issues as defined as the ones [the group] had  
6 listed, then why aren't they stepping forward." Pltf's Depo. at p.  
7 51-52; see also Pltf's Declr. at ¶ 38.

8 Sundstrom held weekly meetings with plaintiff to determine  
9 what issues he was working on. She had similar meetings with other  
10 subordinates, who were Caucasian. Sundstrom Declr. at ¶ 4.  
11 Plaintiff alleges that on a number of occasions, Sundstrom falsely  
12 claimed that plaintiff did not follow through on accomplishing  
13 certain things she had instructed him to do during these meetings.  
14 Pltf's Declr. at ¶ 39.

15 Plaintiff contends that before he met Sundstrom in her office  
16 on March 7, 2006, for one of these meetings, he "asked Ms.  
17 Sundstrom if I could bring a tape-recorder so I could effectively  
18 note down exactly what she wanted." Pltf's Depo. at p. 60. The  
19 record contains a copy of an email sent by plaintiff on March 7,  
20 2006, at 1:03 p.m., to Sundstrom, which states:

21 I wanted to follow-up regarding our last two meetings  
22 (2/24 & 3/3) and thank you for agreeing to my recording  
23 of our meeting in order that there is clear and  
24 consistent communication relating to my assignments from  
25 you. As I mentioned in our Feb. 24th meeting, I  
26 suggested recording our meetings as a result of my  
27 previous supervisor's attributing accusations that were  
28 confoundedly not true, and I would like to avoid that  
experience from happening again. If you like, I will  
provide you a transcript of our Mar 3rd meeting once I  
have completed it in order that we both may have the same  
consistent information. In the future, if you would  
prefer that I use a PDC recorder that would be fine by  
me. Again, thank you for your understanding and if there  
is anything I need to prepare for our meeting this

1       afternoon please advise.

2       Pltf's Exh. 32.

3       According to plaintiff, at the start of the March 7 meeting  
4       with Sundstrom, he "put the tape-recorder down, and . . . asked her  
5       do you mind if I tape the meetings." Pltf's Depo. at p. 62. He  
6       states that he never insisted upon taping. Pltf's Declr. at ¶ 30.  
7       According to plaintiff, Sundstrom responded that she did not "give  
8       a damn whether he taped or not." Pltf's Depo. at p. 62. She then  
9       got up shortly afterward, and left her office with plaintiff still  
10      in it. Id. at pp. 58, 63. During this exchange, plaintiff  
11      contends that Sundstrom raised her voice in a "tirade" concerning  
12      performance issues she had with the inadequacies of plaintiff's  
13      work on the plan for the South Waterfront project. Id. at pp. 65,  
14      67-68.

15      Sundstrom states that after she and plaintiff sat down, he put  
16      a tape-recorder on the table. Sundstrom Depo. at p. 211. She  
17      reacted to the fact that the tape-recorder was on the table and  
18      asked plaintiff what it was for. Id. at p. 212. She remembers  
19      that plaintiff said, "[y]ou said I could tape-record meetings."  
20      Id. Sundstrom stated that she had never said that; she then asked  
21      him if he intended to tape-record the meeting. Id. She told him  
22      that she considered the meeting over and asked him to leave her  
23      office. Id. He did not, so she left. She states that in terms of  
24      voice volume, she did not raise her voice. Id.

25      Plaintiff states he observed Sundstrom, after leaving her  
26      office, go to general counsel Baines's office. Pltf's Depo. at p.  
27      59. Not finding him, he observed her go to Warner's office. Id.  
28      At that point, plaintiff returned to his cubicle. He states that

1 he "couldn't understand what happened" and the "next thing I know  
2 was that I was being terminated." Id. The March 7, 2005 exchange  
3 was the last meeting plaintiff had with Sundstrom before his  
4 termination.

5 Sundstrom decided to terminate plaintiff. In her deposition,  
6 she explains that the PDC exercised the termination provision of  
7 the Last Change Agreement because it determined that plaintiff had  
8 violated the terms of that agreement. Sundstrom Depo. at p. 219.  
9 Sundstrom further explained that she

10 viewed that the act of him putting a tape-recorder on the  
11 table and wanting to record our conversation indicated  
12 that we had a broken working relationship and he was not  
able to communicate with me in a productive and  
professional way.

13 Id.

14 Defendants note that in his deposition, Warner implied that he  
15 and Sundstrom had spoken many times about plaintiff's MWESB Program  
16 and that in many of these conversations, they discussed plaintiff,  
17 and "his role, his involvement with the union, and his involvement  
18 or lack thereof about putting the agreements together that needed  
19 to be finalized to live up to PDC commitments to the South  
20 Waterfront Agreement." Warner Depo. at p. 102. He explained that  
21 certain agreements with the South Waterfront Partners had not been  
22 finalized, particularly those requiring using women and minority  
23 workforce members and the need to work with the general contractor  
24 and the labor unions to come up with an agreement as to how to get  
25 to a certain level of minority and women workforce participation.  
26 Id. at p. 104. Warner refused to lay the blame for the stalling of  
27 an agreement solely at plaintiff's feet. Id. at pp. 104-05. But,  
28 defendants rely on this testimony as another basis for plaintiff's

1 termination.

2 The termination letter signed by Sundstrom and dated March 7,  
3 2005, states, in pertinent part:

4 Pursuant to the terms of the Last Chance Agreement  
5 between you and the Portland Development Commission (PDC)  
6 dated October 3, 2005, your employment with PDC has been  
7 terminated effective immediately. The Last Chance  
8 Agreement addresses behavior expectations pertaining to  
9 your treatment of others, including your supervisor, and  
dependability in terms of timely completion of work  
assignments. You have not completed several recent  
assignments and have refused to discuss them with me,  
your supervisor, in a productive and respectful manner.

10 Pltff's Exh. 33.

#### 11 STANDARDS

12 Summary judgment is appropriate if there is no genuine issue  
13 of material fact and the moving party is entitled to judgment as a  
14 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the  
15 initial responsibility of informing the court of the basis of its  
16 motion, and identifying those portions of "'pleadings, depositions,  
17 answers to interrogatories, and admissions on file, together with  
18 the affidavits, if any,' which it believes demonstrate the absence  
19 of a genuine issue of material fact." Celotex Corp. v. Catrett,  
20 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

21 "If the moving party meets its initial burden of showing 'the  
22 absence of a material and triable issue of fact,' 'the burden then  
23 moves to the opposing party, who must present significant probative  
24 evidence tending to support its claim or defense.'" Intel Corp. v.  
25 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)  
26 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th  
27 Cir. 1987)). The nonmoving party must go beyond the pleadings and  
28 designate facts showing an issue for trial. Celotex, 477 U.S. at

1 322-23.

2 The substantive law governing a claim determines whether a  
3 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors  
4 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as  
5 to the existence of a genuine issue of fact must be resolved  
6 against the moving party. Matsushita Elec. Indus. Co. v. Zenith  
7 Radio, 475 U.S. 574, 587 (1986). The court should view inferences  
8 drawn from the facts in the light most favorable to the nonmoving  
9 party. T.W. Elec. Serv., 809 F.2d at 630-31.

10 If the factual context makes the nonmoving party's claim as to  
11 the existence of a material issue of fact implausible, that party  
12 must come forward with more persuasive evidence to support his  
13 claim than would otherwise be necessary. Id.; In re Agricultural  
14 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);  
15 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,  
16 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

#### 17 DISCUSSION

18 Plaintiff brings race discrimination and retaliation claims  
19 under Title VII and Oregon Revised Statute § (O.R.S.) 659A.030. He  
20 also brings a race discrimination claim under 42 U.S.C. § 1981 and  
21 a First Amendment retaliation claim under 42 U.S.C. § 1983.

#### 22 I. Title VII and O.R.S. 659A.030 Discrimination Claims

23 Standards used to analyze federal Title VII claims apply to  
24 Oregon claims under O.R.S. Chapter 659A. E.g., Conley v. City of  
25 Lincoln City, No. CV-02-216-AS, 2004 WL 948427, at \*13 (D. Or. Apr.  
26 20, 2004) (citing cases for the proposition that Oregon courts  
27 consistently hold that case law developed by federal courts in the  
28 interpretation of Title VII is used to interpret Chapter 659);

23 - FINDINGS & RECOMMENDATION

1 Snead v. Metropolitan Prop. & Cas. Ins. Co., 237 F.3d 1080, 1093  
 2 (9th Cir. 2001) (burden shifting formula of McDonnell Douglas Corp.  
 3 v. Green, 411 U.S. 792 (1973), applies to Oregon statutory  
 4 discrimination claims litigated in federal court); Granville v.  
 5 City of Portland, Nos. CV-02-1016-HA, CV-04-1295-HA, 2005 WL  
 6 1113841, at \*3 (D. Or. May 10, 2005) (citing Henderson v. Jantzen,  
 7 Inc., 79 Or. App. 654, 719 P.2d 1322 (1986) for proposition that  
 8 McDonnell Douglas prima facie case requirements apply to Oregon  
 9 statutory discrimination claims).

10 The McDonnell Douglas burden-shifting framework requires the  
 11 plaintiff to first establish a prima facie case of unlawful  
 12 discrimination, followed by the defendant articulating a  
 13 legitimate, nondiscriminatory reason for its action. McGinest v.  
 14 GTE Serv. Corp., 360 F.3d 1103, 1122 n.16 (9th Cir. 2004). If the  
 15 defendant does so, the plaintiff must show that the articulated  
 16 reason is a pretext for discrimination. Id.; Aragon v. Republic  
 17 Silver State Disposal, Inc., 292 F.3d 654, 658-59 (9th Cir. 2002).

#### 18 A. Prima Facie Case

19 To establish a prima facie case of race discrimination,  
 20 plaintiff must show that (1) he belongs to a racial minority; (2)  
 21 he was qualified to do the job; (3) he was subjected to an adverse  
 22 job action; and (4) "either that similarly situated individuals  
 23 outside [his] protected class were treated differently, or other  
 24 circumstances surrounding the adverse employment action give rise  
 25 to an inference of discrimination." Bodett v. CoxCom, Inc., 366  
 26 F.3d 736, 744 (9th Cir. 2004) (internal quotation omitted). "[T]he  
 27 requisite degree of proof necessary to establish a prima facie case  
 28 . . . on summary judgment is minimal and does not even need to rise



1 to the level of a preponderance of the evidence." Wallis v. J.R.  
2 Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994).

3 There is no dispute that plaintiff is African-American. There  
4 is at least a question of fact as to whether he was adequately  
5 performing his job. There is no dispute that he suffered the  
6 adverse employment action of termination.

7 As to the fourth prima facie element, plaintiff has at least  
8 created an issue of fact as to whether, after his termination, his  
9 job duties were performed by Classen, a Caucasian. Pltf's Declr.  
10 at ¶ 44 (noting what while PDC discovery documents showed that  
11 Sundstrom announced she intended to create a "Diversity Manager"  
12 position to replace plaintiff, it does not appear the position was  
13 filled; documents show that Classen was promoted into plaintiff's  
14 former position which was titled "Contracts Compliance Manager"  
15 when plaintiff had it, but was reclassified as "Contracts  
16 Compliance Coordinator"); Pltf's Exh. 39 (a January 2007  
17 reclassification request form to reclassify the "Contracts  
18 Compliance Coordinator" position held by Classen, at a higher  
19 salary, and specifically stating that previously, the duties had  
20 been performed by the Contracts Compliance Manager).

21 In Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1062  
22 (9th Cir. 2002), the court explained that the plaintiff could  
23 satisfy the fourth element of her prima facie case of sex  
24 discrimination by showing that similarly situated men were treated  
25 more favorably "or her position was filled by a man" after her  
26 termination. Thus, here, plaintiff's evidence suggesting that  
27 Classen, a Caucasian, replaced plaintiff following his discharge,  
28 is sufficient to satisfy the fourth element of the prima facie

1 case.

2 B. Legitimate Nondiscriminatory Reason

3 The March 7, 2005 termination letter, and the individual  
4 defendants' deposition testimony, show that Sundstrom concluded  
5 that plaintiff had violated the terms of the Last Chance Agreement  
6 and that he had failed to meet other deadlines and goals for his  
7 program. These are legitimate, nondiscriminatory reasons for the  
8 termination decision.

9 C. Pretext

10 Plaintiff can establish pretext in two ways: "(1) indirectly,  
11 by showing that the employer's proffered explanation is 'unworthy  
12 of credence' because it is internally inconsistent or otherwise not  
13 believable, or (2) directly, by showing that unlawful  
14 discrimination more likely motivated the employer." Chuang v.  
15 University of Ca. Davis, Bd. of Trustees, 225 F.3d 1115, 1127 (9th  
16 Cir. 2000). Plaintiff does not need to prove both at summary  
17 judgment. To survive summary judgment, plaintiff is not required  
18 to provide direct evidence of discriminatory intent as long as a  
19 reasonable factfinder could conclude, based on plaintiff's prima  
20 facie case and the factfinder's disbelief of defendant's reasons  
21 for discharge, that discrimination was the real reason for  
22 defendant's actions. Nidds v. Schindler Elevator Corp., 113 F.3d  
23 912, 918 n.2 (9th Cir. 1996).

24 Additionally, plaintiff does not have to introduce additional,  
25 independent evidence of discrimination at the pretext stage.  
26 Chuang, 225 F.3d at 1127. Rather, "a disparate treatment plaintiff  
27 can survive summary judgment without producing any evidence of  
28 discrimination beyond that constituting his prima facie case, if

1 that evidence raises a genuine issue of material fact regarding the  
2 truth of the employer's proffered reasons." Id.

3 A plaintiff is required to produce "very little" direct  
4 evidence of an employer's discriminatory intent to move past  
5 summary judgment. Id. at 1128. If the plaintiff relies on  
6 circumstantial evidence, it must be "specific" and "substantial" to  
7 create a triable issue of fact as to whether the employer intended  
8 to discriminate. Godwin, 150 F.3d at 1222.<sup>2</sup>

9 Circumstantial evidence "can take two forms." Coghlan v.  
10 American Seafoods Co. LLC, 413 F.3d 1090, 1095 (9th Cir. 2005).  
11 The plaintiff can make an affirmative case that the employer is  
12 biased by relying on statistical evidence. Id. Or, "the plaintiff  
13 can make his case negatively, by showing the employer's proffered  
14 explanation for the adverse action is 'unworthy of credence.'" Id.  
15 As the Supreme Court explained in Reeves v. Sanderson Plumbing  
16 Prods., Inc., 530 U.S. 133, 147 (2000), "[p]roof that the  
17 defendant's explanation is unworthy of credence is simply one form  
18 of circumstantial evidence that is probative of intentional  
19 discrimination, and it may be quite persuasive." Moreover, "a  
20 plaintiff's prima facie case, combined with sufficient evidence to  
21 find that the employer's asserted justification is false, may  
22

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23  
24 <sup>2</sup> But see Cornwell v. Electra Cent. Credit Un., 439 F.3d  
25 1018, 1030-31 (9th Cir. 2006) (discussing whether post-Godwin  
26 cases may have overturned the Godwin requirement that a  
27 plaintiff's circumstantial evidence of pretext must be "specific  
28 and "substantial," but not finally deciding the issue because the  
evidence presented by the plaintiff was sufficient to create a  
genuine issue of fact regarding the defendant's motive for its  
actions under the Godwin specific and substantial standard in any  
event).

1 permit the trier of fact to conclude that the employer unlawfully  
2 discriminated." Id. at 148.

3 Plaintiff presents no direct evidence of race discrimination.  
4 Instead, plaintiff relies on the following circumstantial evidence  
5 to create an issue of pretext: (1) plaintiff did not receive  
6 adequate staffing while Lawrence, a Caucasian employee, did; (2)  
7 Sundstrom, a Caucasian, replaced Winston, an African-American; (3)  
8 Sundstrom allegedly treated the only other African-American  
9 employee she directly supervised poorly; (4) a comment Sundstrom  
10 made at the January 2006 meeting with African-American employees;  
11 (5) the resignation by African-American employee Rita McCain-Walker  
12 in April 2006; (6) the failure to timely give a raise to African-  
13 American employee Komi Kalevor; (7) the fact that twenty-two  
14 African-American employees left the PDC between mid-2004 and mid-  
15 2006; and (8) a history of race discrimination at the PDC as  
16 evidenced by certain events occurring in 1991.

17 For the reasons explained below, I conclude that the evidence  
18 regarding Sundstrom's treatment of her only other African-American  
19 employee, her comment at the January 2006 meeting, and McCain-  
20 Walker's complaint in November 2005 that poor treatment of her by  
21 her Caucasian supervisor was creating a problem with her ability to  
22 obtain a raise or a promotion, combine to produce specific and  
23 substantial circumstantial evidence of pretext. Because I need not  
24 do so, I decline to address the relevance or admissibility of the  
25 other evidence plaintiff proffers in support of his pretext  
26 argument.

27 1. Sundstrom's Treatment of Cain

28 In early 2006, Sundstrom supervised only two African-American

1 employees - plaintiff and Christina Cain. Pltf's Declr. at ¶ 43.  
2 Cain has been at the PDC for thirty years, and for seventeen years  
3 preceding June 2006, a few months after plaintiff's termination,  
4 she had been the Senior Executive Assistant to the Commission.  
5 Pltf's Exh. 50 (Cain Declr.) at ¶¶ 1-2.

6 Cain alleges that after Sundstrom started in November 2005,  
7 and especially after she and other African-American employees held  
8 meetings with Warner and Sundstrom regarding the retention of  
9 African-American employees at the PDC, Sundstrom began treating  
10 Cain poorly. Id. at ¶ 3, 14, 15, 16. Specifically, Cain states  
11 that Sundstrom unjustly criticized her work performance, was not  
12 positive with her, was not supportive of her, micro-managed her  
13 work, refused her requested time off, and made demeaning comments  
14 to her such as "[y]ou should be happy to still have a job here,"  
15 "[y]ou should be happy to still be making the same amount of money  
16 here," and "[y]ou should be happy that you are still on the 7th  
17 (executive office) floor." Id. at ¶ 14.

18 Cain recites that during a March 31, 2006 meeting with  
19 Sundstrom, Sundstrom told Cain that she had poor interpersonal  
20 skills, had no communication skills, was not well liked by anyone,  
21 and that Sundstrom thought Cain was "playing" her and Sundstrom was  
22 "fed up" with her. Id. at ¶ 15. Cain also states that Sundstrom  
23 repeatedly cancelled scheduled meetings between them which were  
24 important to Cain's performance of her job and that Sundstrom  
25 refused to speak to her from time to time. Id. at ¶ 16.

26 Cain further states that Sundstrom abruptly removed Cain's  
27 administrative support staffperson and placed that person under  
28 Sundstrom's supervision. Id. Sundstrom then had that staffperson

1 replace Cain at the Commission meetings, which Cain had been  
2 attending for seventeen years. Id.

3 Cain asserts that never before had she been treated by any  
4 supervisor at PDC the way Sundstrom treated her. Id. She further  
5 states that she observed Sundstrom interact with Sundstrom's other,  
6 Caucasian subordinates and that Sundstrom did not use a demeaning  
7 tone of voice with them, was not negative with them, and did not  
8 treat them with a lack of respect, as she did when she interacted  
9 with Cain. Id. at ¶ 17.

10 Cain complained to Human Resources and filed internal  
11 grievances. Id. at ¶¶ 19; Pltf's Exhs. 61, 62. Id. On May 15,  
12 2006, she filed an Oregon Bureau of Labor and Industries (BOLI)  
13 complaint against the PDC alleging race discrimination and  
14 retaliation. Id. at ¶ 21; Pltf's Exh. 64.

15 As the Ninth Circuit discussed in a 1995 case, "an employer's  
16 conduct tending to demonstrate hostility toward a certain group is  
17 both relevant and admissible where the employer's general hostility  
18 towards that group is the true reason behind firing an employee who  
19 is a member of that group." Heyne v. Caruso, 69 F.3d 1475, 1479  
20 (9th Cir. 1995) (citing Spulak v. K Mart Corp., 894 F.2d 1150, 1156  
21 (10th Cir. 1990) ("As a general rule, the testimony of other  
22 employees about their treatment by the defendant [employer] is  
23 relevant to the issue of the employer's discriminatory intent."),  
24 Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1104 (8th Cir. 1988)  
25 ("[e]vidence of prior acts of discrimination is relevant to an  
26 employer's motive in discharging a plaintiff, even where this  
27 evidence is not extensive enough to establish discriminatory animus  
28 by itself.")).

1 The Heyne court concluded that the district court abused its  
2 discretion by refusing to allow the plaintiff to introduce  
3 testimony of other employees who claimed to have been harassed by  
4 the same supervisor. Id. at 1482. The testimony was allowable  
5 because it could have affected the jury's determination of whether  
6 the plaintiff's dismissal was motivated by a non-discriminatory  
7 reason or for a forbidden reason. Id.

8 Under Heyne, Cain's testimony is relevant and admissible.  
9 Cain recites specific statements and conduct. Her testimony  
10 addresses conduct occurring during the same time period as  
11 plaintiff's termination and by the same supervisor. I conclude  
12 that Cain's testimony is specific and substantial circumstantial  
13 evidence by which the factfinder could infer that defendants'  
14 articulated motive for its actions, is a pretext for race  
15 discrimination.

16 2. Sundstrom's January 2006 Comment

17 At the meeting in January 2006 that African-American employees  
18 held with Sundstrom to discuss diversity-related issues previously  
19 raised with Warner in November 2005, and specifically, the  
20 treatment of African-American employees, Sundstrom allegedly said  
21 that African-Americans were not the only employees of color at the  
22 PDC and "if there were issues as defined as the ones we had raised,  
23 why aren't they stepping forward?" Pltf's Depo. at p. 51-52;  
24 Pltf's Declr. at ¶ 38.

25 Plaintiff argues that this statement by Sundstrom is evidence  
26 of a bias against African-Americans because it minimized the  
27 group's complaints. I agree with plaintiff that Sundstrom's  
28 statement can be interpreted as being dismissive of the complaints

1 made by African-American employees and thus, could be interpreted  
2 to show animosity toward those employees. While it is possible  
3 that Sundstrom was trying to gauge broader questions of diversity  
4 at the PDC by inquiring if other groups were also feeling  
5 discriminated against, the factfinder should evaluate what  
6 Sundstrom meant. Because is a specific statement, occurring  
7 approximately two months before plaintiff was terminated, was made  
8 by the person who terminated plaintiff, and can be interpreted to  
9 exhibit racial bias, it is specific and substantial circumstantial  
10 evidence of pretext.

### 11 3. McCain-Walker's Resignation

12 Rita McCain-Walker was the Homeownership Coordinator for the  
13 PDC. Pltf's Exh. 38 at p. 2. In his Amended Memorandum in  
14 Opposition to Defendants' Motion for Summary Judgment, plaintiff  
15 states that McCain-Walker, who is African-American, complained  
16 about poor treatment from her Caucasian supervisor during the  
17 November 2005 meeting with Warner. Pltf's Am. Mem. at p. 27  
18 (noting that "[a]lso brought to Warner's attention were the  
19 problems McCain-Walker, another employee, was having with her  
20 Caucasian supervisor, which were affecting her ability to get  
21 raises and a promotion she was seeking").

22 Plaintiff also asserts that "McCain-Walker had to resign her  
23 position as PDC Homeownership Coordinator in April 2006, as a  
24 direct result of ongoing poor/unfair treatment by her supervisor."

25 Id.

26 The evidence in the record cited in support of these  
27 assertions consists of: (1) a statement by Cain in her  
28 declaration; (2) Warner's deposition testimony; (3) McCain-Walker's



1 resignation letter; and (4) plaintiff's declaration.

2 Plaintiff recites in his declaration that McCain-Walker's  
3 supervisor was Caucasian. Pltf's Declr. at ¶ 48. In her  
4 declaration, Cain states that at the meeting with Warner in  
5 November 2005, she recalled McCain-Walker raising an issue about  
6 McCain-Walker's manager treating her unfairly and how that was  
7 hindering her ability to get a raise and be promoted. Pltf's Exh.  
8 50 (Cain Declr.) at ¶ 11.

9 Warner testified that he believed that "maybe" McCain-Walker  
10 had, at the November 2005 meeting, "talked about her experience  
11 that she didn't feel she was being utilized to her fullest in the  
12 organization in terms of her full capabilities[.]" Pltf's Exh. 75  
13 (Warner Depo.) at p. 74. Warner's testimony establishes only that  
14 McCain-Walker spoke about her alleged underutilization. It does  
15 not support plaintiff's assertion that McCain-Walker mentioned  
16 interference with a raise or a promotion.

17 Plaintiff's Exhibit 38 is McCain-Walker's April 28, 2006  
18 resignation letter. Pltf's Exh. 38. Notably missing from the  
19 letter is any reference to problems McCain-Walker had with her  
20 Caucasian supervisor, or problems getting a raise or a promotion.  
21 Id.

22 McCain-Walker mentions what she viewed as a "lack of  
23 commitment, value and support for my position," and considered this  
24 "an obstacle to progress and the mission of PDC." Id. She noted  
25 that she "felt less valued as a professional and particularly an  
26 African-American employee." Id. She also stated that "PDC's  
27 commitment to African American homeownership is seriously lacking  
28 as compared to other minority groups." Id. She continued by

1 stating that "[f]rom what I have learned in the African American  
2 community, there is deep resentment and lack of trust and based on  
3 my personal experience, I can't totally disagree with these  
4 opinions." Id.

5 Finally, McCain-Walker stated:

6 Equally important in my decision to accept this [non-PDC]  
7 position has been the removal of African American  
8 employees from this organization. I sincerely hope that  
9 PDC's management addresses the precarious environment for  
10 African American employees whose contributions,  
diversity, suggestions and work are questioned, under-  
valued and viewed as complaints rather than efforts to  
move the organization forward.

11 Id.

12 In his deposition, Warner states that he talked with McCain-  
13 Walker a number of times and that she expressed to him the concerns  
14 and reasons she gave for resigning. Pltf's Exh. 75 (Warner Depo.)  
15 at p. 126. Other than stating that he knew that McCain-Walker  
16 believed that the PDC's commitment to African-American  
17 homeownership was severely lacking as compared to other minority  
18 groups, he does not specify what concerns she actually raised with  
19 him or when they discussed these concerns. Id. at pp. 126, 128.

20 The resignation letter fails to show that McCain-Walker  
21 actually resigned because of problems created by her Caucasian  
22 supervisor making it difficult for her to obtain a raise or  
23 promotion. The letter does not mention the supervisor, either by  
24 position or name, and does not mention the lack of a raise or  
25 promotion. McCain-Walker's general reference to being undervalued  
26 and underutilized is not evidence that the Caucasian supervisor  
27 treated her poorly because she was African-American.

28 Additionally, the other reasons for her resignation as stated

1 in her April 18, 2006 letter, do not, without offering specific  
2 facts in support of her opinions, create an issue of pretext. The  
3 letter contains nothing more than McCain-Walker's opinions with no  
4 evidentiary basis in support. While she states that there were  
5 "strenuous" days where she felt "less valued" as a professional and  
6 particularly as an African-American employee, she offers no facts  
7 upon which she bases this opinion. She offers her opinion that  
8 PDC's commitment to African-American homeownership was lacking as  
9 compared with other minority groups, but again, she offers no facts  
10 in support. She refers to the "precarious environment for African-  
11 American employees" and notes the "removal" of African-American  
12 employees, but she cites no facts supporting her belief that the  
13 environment was "precarious" or supporting her insinuation that the  
14 "removal" was motivated by ill-will toward African-Americans.  
15 Without such facts, the opinions offered in the resignation letter  
16 cannot be considered specific and substantial evidence of pretext.

17       However, even without considering the resignation letter or  
18 Warner's deposition testimony, Cain's statement that McCain-Walker  
19 raised an issue of poor treatment by a Caucasian supervisor is  
20 additional evidence of pretext which is appropriate to consider  
21 under Heyne. Importantly, while the supervisor at issue is not  
22 Sundstrom, the alleged poor treatment by a Caucasian supervisor,  
23 coupled with the fact that McCain-Walker resigned approximately  
24 five months later, raises an inference of pretext.

25       Considered together, the evidence regarding Sundstrom's  
26 treatment of Cain, Sundstrom's statement at the January 2006  
27 meeting with African-American employees, and McCain-Walker's  
28 November 2005 complaint to Warner, is appropriately considered

1 specific and substantial circumstantial evidence of pretext.  
2 Accordingly, I recommend that defendants' summary judgment motion  
3 as to the Title VII and O.R.S. 659A.030 discrimination claims, be  
4 denied.

5 II. 42 U.S.C. § 1981 Race Discrimination Claim

6 Plaintiff brings a section 1981 claim against the PDC,  
7 alleging that the PDC impaired his employment contract rights on  
8 the basis of race. Compl. at ¶ 27. Under section 1981(a), all  
9 persons have the same right to make and enforce contracts and the  
10 full and equal benefits of all laws "as is enjoyed by white  
11 citizens." 42 U.S.C. § 1981(a). As explained in Lowe v. City of  
12 Monrovia, 775 F.2d 998, 1010 (9th Cir. 1985), amended, 784 F.2d  
13 1407 (9th Cir. 1986), claims of disparate treatment under section  
14 1981 and Title VII are parallel because both require proof of  
15 intentional discrimination. The same standards are used to prove  
16 both a Title VII disparate treatment claim and a section 1981  
17 claim. Id. "[F]acts sufficient to give rise to one are sufficient  
18 to give rise to the other." Id.

19 Based on Lowe, defendants make no new arguments in support of  
20 their motion against the section 1981 claim. Plaintiff agrees that  
21 the same legal standard applies to both claims. Pltf's Am. Mem. at  
22 p. 22 n.27.

23 Thus, my recommendation on this claim is consistent with my  
24 recommendation on the Title VII claim: defendants' motion should  
25 be denied.

26 III. Title VII and O.R.S. 659A.030 Retaliation Claims

27 As with the straightforward disparate treatment discrimination  
28 claims, the federal and state retaliation claims share the same

1 analysis, Payne v. Apollo College - Portland, Inc., 327 F. Supp. 2d  
2 1237, 1245 (D. Or. 2004), and thus, are discussed together.

3 The order and allocation of proof for disparate treatment  
4 cases under McDonnell Douglas also govern actions for retaliatory  
5 discharge under Title VII. Yartzoff v. Thomas, 809 F.2d 1371, 1376  
6 (9th Cir. 1987). If the plaintiff establishes a prima facie case,  
7 the burden shifts as in a disparate treatment case. Stegall v.  
8 Citadel Broadcasting Co., 350 F.3d 1061, 1066 (9th Cir. 2003).

9 To establish a prima facie case of retaliation, plaintiff must  
10 show (1) that he engaged in protected activity; (2) he was  
11 subjected to an adverse employment action; and (3) the employer's  
12 action is causally related to the protected activity. Id. at 1065-  
13 66.

14 Defendants do not appear to dispute that plaintiff engaged in  
15 protected activity and that he was subjected to an adverse  
16 employment action. As noted above, his termination is clearly an  
17 adverse employment action. His participation in the meeting in  
18 November 2005 with Warner and in January 2006 with Sundstrom  
19 regarding diversity issues at the PDC and in particular, treatment  
20 of African-Americans, is protected activity. Ray v. Henderson, 217  
21 F.3d 1234, 1240 n.3 (9th Cir. 2000) (making an informal complaint  
22 to a supervisor is a protected activity).

23 In Villiarimo, the Ninth Circuit confirmed that timing alone  
24 can satisfy the third prima facie factor of causation. 281 F.3d at  
25 1065. But, the court was careful to explain that this is not true  
26 in every case. Id. In a 2001 case, the Supreme Court noted that  
27 "cases that accept mere temporal proximity between an employer's  
28 knowledge of protected activity and an adverse employment action as

1 sufficient evidence of causality to establish a prima facie case  
2 uniformly hold that the temporal proximity must be 'very close.'  
3 Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273-74 (2001).

4 In a case after Villiarimo, the Ninth Circuit rejected a  
5 bright line temporal proximity test. Coszalter v. City of Salem,  
6 320 F.3d 968, 977-78 (9th Cir. 2003) (noting that retaliation often  
7 follows quickly upon the act that offended the retaliator but that  
8 is not always so because for a variety of reasons, some retaliators  
9 prefer to take their time and may wait until the victim is  
10 especially vulnerable or until an especially hurtful action is  
11 possible or until they think the lapse of time disguises their true  
12 motivation).

13 Here, plaintiff establishes the prima facie causation element  
14 by showing that he engaged in protected activity in January 2006  
15 and that Sundstrom terminated him two months later, in March 2006.  
16 This is a sufficiently short period of time to raise an issue of  
17 causation.

18 Following the rest of the McDonnell Douglas burden shifting  
19 analysis, as recited above, defendants offer legitimate,  
20 nondiscriminatory reasons for the termination. Plaintiff, however,  
21 based on the discussion above in connection with the discrimination  
22 claims, creates an issue of pretext sufficient to defeat  
23 defendants' summary judgment motion. I recommend that the motion  
24 be denied as to the retaliation claims.

#### 25 IV. 42 U.S.C. § 1983 First Amendment Retaliation Claim

26 Plaintiff brings this claim against all three defendants. In  
27 the Second Amended Complaint, he generally alleges that at least in  
28 part, defendants' conduct has been in retaliation for his protected

1 speech about a matter of public concern, that is, racial  
2 discrimination and the lack of diversity at the PDC and in the  
3 community. Sec. Am. Compl. at ¶ 21.

4 To sustain a section 1983 First Amendment retaliation claim,  
5 plaintiff must show that the speech at issue was constitutionally  
6 protected, that he suffered an adverse employment action, and that  
7 the speech was a substantial or motivating factor in the adverse  
8 employment action. Pool v. Van Rheen, 297 F.3d 899, 906 (9th Cir.  
9 2002); Huskey v. City of San Jose, 204 F.3d 893, 899 (9th Cir.  
10 2000).

11 Defendants make no argument regarding the first two factors.  
12 As noted above, there is no question that plaintiff suffered an  
13 adverse employment action. I interpret defendants' failure to  
14 raise the first factor as a concession that plaintiff's statements  
15 at the meetings with Warner in November 2005 and with Sundstrom in  
16 January 2006, are constitutionally protected.

17 Defendants argue that they are entitled to summary judgment  
18 because plaintiff cannot show that his speech was a substantial or  
19 motivating factor in his termination. I disagree.

20 In Coszalter, the Ninth Circuit reiterated that there are  
21 "three ways in which a plaintiff can show that retaliation was a  
22 substantial or motivating factor behind a defendant's adverse  
23 employment actions." Coszalter, 320 F.3d at 977. First, a  
24 plaintiff can rely on proximity of time between the protected  
25 action and the alleged retaliatory employment decision to show that  
26 the plaintiff was terminated in retaliation for his speech. Id.

27 Second, "a plaintiff can introduce evidence that his employer  
28 expressed opposition to his speech, either to him or to others."

1 Id. (internal quotation omitted). Third, a plaintiff can introduce  
2 evidence that his "employer's proffered explanations for the  
3 adverse employment action were false and pre-textual." Id.

4 As to proximity in time, the court noted that "[d]epending on  
5 the circumstances, three to eight months is easily within a time  
6 range that can support an inference of retaliation." Id. Here,  
7 plaintiff's termination occurred approximately four months after he  
8 and others met with Warner in November 2005 and approximately two  
9 months after he and others met with Sundstrom in January 2006.  
10 This proximity in time between his protected speech and his  
11 termination creates an issue of fact as to whether plaintiff's  
12 protected speech was a motivating factor in his termination.

13 Additionally, plaintiff's evidence of pretext, discussed above  
14 in connection with the Title VII claims, is sufficient here to  
15 create an issue of fact regarding defendants' motivation. Thus, I  
16 recommend that defendants' motion on the section 1983 First  
17 Amendment claim, be denied.

#### 18 V. Punitive Damages

19 As an alternative to their motions directed to the merits of  
20 each claim, defendants separately move against plaintiffs' claims  
21 for punitive damages.

22 Defendants make arguments in opposition to plaintiff's alleged  
23 request for punitive damages on the section 1981 and 1983 claims,  
24 and the Title VII and O.R.S. 659A.030 claims. However, under my  
25 reading of the Second Amended Complaint, I do not see that  
26 plaintiff seeks punitive damages on the race discrimination or  
27 retaliation claims under Title VII or O.R.S. 659A.030.

28 In his section 1983 claim, his First Claim for Relief pleaded



1 in the Second Amended Complaint, plaintiff expressly demands  
2 punitive damages against Sundstrom and Warner. Sec. Am. Compl. at  
3 ¶ 24. In his section 1981 claim, his Second Claim for Relief, he  
4 expressly demands punitive damages against the PDC. Id. at ¶ 28.

5 In his O.R.S. 659A.030 claim for race discrimination and  
6 retaliation, plaintiff makes no mention of punitive damages, other  
7 than to apparently incorporate by reference his prior allegations.  
8 Id. at ¶ 30 ("As applicable, Henry alleges the above."). He  
9 asserts that "[p]ursuant to ORS 659A.885(1) and ORS 20.107, Henry  
10 should be awarded his lost back pay, equitable relief, his  
11 reasonable attorney fees, and litigation costs and expenses,  
12 including expert witness fees." Id. at ¶ 32. For actions brought  
13 under O.R.S. 659A.030, O.R.S. 659A.885 makes no provision for  
14 punitive damages. O.R.S. 20.107 provides for attorney's and expert  
15 witness fees for prevailing plaintiffs in discrimination cases, but  
16 also makes no provision for punitive damages.

17 Similar to his O.R.S. 659A.030 claim, in his Title VII race  
18 discrimination and retaliation claim, plaintiff makes no express  
19 mention of punitive damages, other than to apparently incorporate  
20 by reference his prior allegations. Id. at ¶ 37 ("As applicable,  
21 Henry realleges the above."). Here, he expressly states that he  
22 should be awarded lost back pay, front pay, and work-related  
23 benefits against the PDC, as well as compensatory damages, and  
24 reasonable attorney's fees and litigation costs, including expert  
25 witness fees. Id. at ¶¶ 40, 41, 42.

26 While Title VII allows for punitive damages, if there were any  
27 ambiguity in plaintiff's Third and Fifth Claims for Relief,  
28 paragraph four of the Prayer of the Second Amended Complaint

1 reiterates plaintiff's assertion of punitive damages and fails to  
2 mention either the O.R.S. 659A.030 claims or the Title VII claims;  
3 it thus makes clear that plaintiff is not seeking punitive damages  
4 on those claims. Thus, I recommend that defendants' motion as to  
5 any punitive damages associated with plaintiff's third and fifth  
6 claims, be granted.

7       Additionally, while the Second Claim for Relief asserts a  
8 claim for punitive damages against the PDC in connection with the  
9 section 1981 claim, the Prayer mentions punitive damages only as to  
10 plaintiff's First Claim for Relief, which is the section 1983  
11 claim, and mentions only Sundstrom and Warner, and not the PDC.  
12 Moreover, as I explained in my October 18, 2006 Findings &  
13 Recommendation on defendants' motion to dismiss, the law does not  
14 allow an assessment of punitive damages against a municipality in  
15 a section 1981 claim. See City of Newport v. Fact Concerts, Inc.,  
16 453 U.S. 247, 271 (1981) (punitive damages not available against a  
17 municipality in a section 1983 action); Bell v. City of Milwaukee,  
18 746 F.2d 1205, 1270 (7th Cir. 1984) (applying holding of City of  
19 Newport to section 1981 claims), overruled on other grounds, Russ  
20 v. Watts, 414 F.3d 783, 791 (7th Cir. 2005). Because plaintiff  
21 brings the section 1981 claim against the PDC only, and punitive  
22 damages are not allowed against that entity, I recommend that  
23 defendants' motion as to any punitive damages claim sought as part  
24 of the section 1981 claim, be granted.

25       Finally, as to the section 1983 claim, "a jury may be  
26 permitted to assess punitive damages in an action under § 1983 when  
27 the defendant's conduct is shown to be motivated by evil motive or  
28 intent, or when it involves reckless or callous indifference to the

1 federally protected rights of others." Smith v. Wade, 461 U.S. 30,  
2 56 (1983). It is unnecessary to show actual malice to qualify for  
3 a punitive damages award. Id. 45-48.

4 Defendants argue that neither Sundstrom's nor Warner's actions  
5 meet the required showing of "malice" or "reckless indifference."  
6 As to Sundstrom, defendants argue that because she acted within her  
7 discretion as a supervisor and made decisions based on legitimate  
8 business reasons, her actions do not meet the required threshold  
9 for punitive damages. As to Warner, defendants contend that since  
10 plaintiff's allegations against Warner are based on his knowledge  
11 or ratification of Sundstrom's alleged discrimination and  
12 retaliation, if punitive damages are inappropriate as to her, they  
13 are inappropriate as to him.

14 Defendants' arguments hinge on the factfinder accepting  
15 defendants' interpretation of the facts. If plaintiff's version of  
16 the facts is found to be true, a jury could find that both  
17 Sundstrom and Warner acted with reckless indifference to  
18 plaintiff's civil rights. I recommend that the motion for summary  
19 judgment directed to the punitive damages portion of the section  
20 1983 claim, be denied.

#### 21 V. Motion to Strike

22 Plaintiff moves to strike certain portions of the record and  
23 argument offered by defendants. I deny the motion for two reasons.  
24 First, I agree with defendants that plaintiff failed to comply with  
25 Local Rule 7.1(a)(1) requiring that the parties confer before  
26 filing a motion. Second, I deny the motion as moot because even  
27 without striking the challenged evidence, I recommend that the  
28 summary judgment motion on the merits of all of the claims, be

1 denied.

2 Plaintiff first filed the motion to strike on June 8, 2007,  
3 the same date plaintiff filed his initial opposition to the summary  
4 judgment motion. I denied the motion for failure to include a  
5 certificate of conferral under Local Rule 7.1, with leave to refile  
6 with the appropriate conferral. On July 2, 2007, plaintiff filed  
7 an amended motion to strike. It starts with a "CERTIFICATE OF  
8 COMPLIANCE" which states: "Counsel for the parties have conferred  
9 in good faith on this motion, which is opposed." Pltf's Am. Mtn to  
10 Strike at p. 1.

11 In defendants' response to the motion to strike, defendants  
12 report that contrary to what is stated in the certificate of  
13 compliance in plaintiff's amended motion to strike, no conferral  
14 took place. The Local Rule requires that plaintiff certify that  
15 "[t]he parties made a good faith effort through personal or  
16 telephone conferences to resolve the dispute and have been unable  
17 to do so" or that "[t]he opposing party willfully refused to  
18 confer." L.R. 7.1(a)(1).

19 According to defendants, and not disputed by plaintiff, after  
20 the June 25, 2007 denial of plaintiff's initial motion to strike  
21 for failure to comply with the certificate of conferral  
22 requirement, plaintiff's counsel sent defense counsel a fax on that  
23 same date, June 25, 2007, stating:

24 Please confirm that defendants oppose Plaintiff's Motion  
25 to Strike Portions of Record and Argument Offered by  
26 Defendants in Support of Defendants' Motion for Summary  
27 Judgment so I can refile the motion and inform the court  
28 accordingly. If you seriously believe there is something  
for us to confer about in this regard, please give me a  
call. I should be available most anytime tomorrow if you  
call.

1 Thank you for your anticipated prompt attention to this  
2 matter.

3 Exh. 2 to Belnavis July 16, 2007 Declr.

4 On July 2, 2007, plaintiff's counsel sent defense counsel  
5 another fax which stated:

6 I wrote you on 6/25/07 as follows:

7 "Please confirm that defendants oppose Plaintiff's  
8 Motion to Strike Portions of Record and Argument  
9 Offered by Defendants in Support of Defendants'  
10 Motion for Summary Judgment so I can refile the  
11 motion and inform the court accordingly. If you  
12 seriously believe there is something for us to  
13 confer about in this regard, please give me a call.  
14 I should be available most anytime tomorrow if you  
15 call."

16 Having heard nothing from you, when I file the motion  
17 today I will tell the court that we have conferred and it  
18 is opposed.

19 Exh. 3 to Belnavis July 16, 2007 Declr.

20 Defendants argue, and I agree, that plaintiff's actions are  
21 insufficient to satisfy the Local Rule not only because plaintiff's  
22 counsel failed to engage in personal or telephone conferences, but  
23 because he never engaged in any substantive discussions to resolve  
24 the dispute presented by the motion.

25 I agree with defendants that, especially after having the  
26 motion denied once for failure to confer, or at least recite the  
27 conferral, it should be denied on this basis.

28 Alternatively, I deny the motion to strike as moot because  
even without striking the evidence, I recommend that the summary  
judgment motions directed to the merits of the claims, be denied.

#### CONCLUSION

I recommend that defendants' motion for summary judgment (#47)  
be denied in all respects except for that part of the motion

1 directed to any punitive damages which plaintiff seeks on her Title  
2 VII, O.R.S. 659A.030, or section 1981 claims. I deny plaintiff's  
3 amended motion to strike (#73).

4 SCHEDULING ORDER

5 The above Findings and Recommendation will be referred to a  
6 United States District Judge for review. Objections, if any, are  
7 due October 2, 2007. If no objections are filed, review of the  
8 Findings and Recommendation will go under advisement on that date.

9 If objections are filed, a response to the objections is due  
10 October 16, 2007, and the review of the Findings and Recommendation  
11 will go under advisement on that date.

12 IT IS SO ORDERED.

13 Dated this 18th day of September, 2007.

14  
15  
16 /s/ Dennis James Hubel  
17 \_\_\_\_\_  
Dennis James Hubel  
United States Magistrate Judge  
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